

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS**

WARREN KEITH HENNESS,

Petitioner,

-vs-

MARGARET BAGLEY, Warden,

Respondent.

:

Case No. 2:01-cv-043

:

Magistrate Judge Michael R. Merz

:

ORDER

This capital habeas corpus case is before the Court on Petitioner's Motion (Doc. No. 163) to grant his prior Motion for Relief from Judgment (Doc. No. 162) because the Respondent has not filed a timely memorandum in opposition.

Petitioner is correct that Respondent's memorandum in opposition was due to be filed by April 12, 2013, that no opposition has been filed, and no extension of time to file has been sought or granted. Nevertheless, the instant Motion is DENIED for failure to comply with S. D. Ohio Civ. R. 7.3. While Petitioner was correct to assert in the Motion for Relief (Doc. No. 162 at PageID 1584) that no prior contact with Respondent's counsel was required by Rule 7.3 before filing that Motion – because, having defended Mr. Henness' conviction successfully through denial of certiorari and having recently sought and obtained an execution date from the Ohio Supreme Court, the State desired to continue to defend it – that is not true of the instant Motion. If the State truly does not wish to defend the conviction and that was its reason for not opposing the Rule 60(b) Motion, its counsel would presumably have said so if called. If, however, the

failure to file is the result of inadvertence, the Court could have been so advised. The Court is very unlikely to grant relief from a judgment which has been affirmed and tested by petition for writ of certiorari merely because no opposition has been filed; a merits analysis is needed whether or not the State files an opposition. Of course, if the State expressly consented to the Motion for Relief, it would be granted, but the Court is unwilling to infer consent from a mere lack of filing.

April 19, 2013.

s/ *Michael R. Merz*
United States Magistrate Judge